

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANNY JOSEPH KENT,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2014

No. 313049

Ontonagon Circuit Court

LC No. 2011-000078-FH

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

A jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim 13 to 15 years old). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 84 months' to 210 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant and the victim had a sexual relationship while the two lived next door to each other. At the time, defendant was 41 years old and the victim was 14 years old. Before trial, defendant's trial counsel indicated that his client would likely accept an offer to plead guilty to reduced charges, but defendant declined to do so less than two weeks before his trial was scheduled to begin. One week before trial was set to begin, the prosecution filed its first witness and exhibit list; defendant received the lists five days before trial. The witness list contained witnesses who had not been listed in the information. At this time, the prosecution also sent defendant an investigation report from the Department of Human Services ("DHS") in which the victim made statements about the offenses, as well as a handwritten statement the victim wrote in January 2012.<sup>1</sup> Shortly after receiving the witness and exhibit lists, defendant moved to exclude the witnesses and exhibits that had not been listed in the information. Defendant did not request a continuance. Before the trial court ruled on defendant's motion, the prosecution filed an amended witness list to add two additional witnesses.

The trial court denied defendant's motion to exclude the witnesses and exhibits, finding, based on the prosecution's representations in a responsive motion and on the record on the first

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<sup>1</sup> Defendant's trial took place in August, 2012.

day of trial, that although the prosecution had filed its witness and exhibit lists shortly before trial, defendant had notice of all witnesses and exhibits through police reports and other documents that the prosecution had previously disclosed to defendant's trial counsel. In addition, the trial court accepted as credible the prosecution's assertion that it had forwarded the DHS investigation report and the additional statement from the victim as soon as it had discovered them.

Defendant argues that the trial court erred by not excluding the witnesses and exhibits that the prosecution failed to list in the information. We review a trial court's decision "to permit the prosecutor to add or delete witnesses to be called at trial . . . for an abuse of discretion[.]" *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "[T]o establish that the trial court abused its discretion, defendant must demonstrate that the court's ruling resulted in prejudice." *Callon*, 256 Mich at 328. "A trial court's factual findings are generally reviewed for clear error." *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007).

MCL 767.40a, which governs the disclosure of the prosecution's witnesses and witness lists, provides, in pertinent part, that:

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

"[T]he underlying purpose of the statute [is] notice to the accused of potential witnesses . . . ." *Callon*, 256 Mich at 327. Precluding evidence because of a violation of MCL 767.40a "is an 'extremely severe' sanction limited to an egregious case." *People v Burwick*, 450 Mich 281, 294; 537 NW2d 813 (1995), quoting *People v Merritt*, 396 Mich 67, 82; 238 NW2d 31 (1976).

In the present case, the prosecution clearly violated MCL 767.40a(3) by failing to provide defendant with its witness list and amended witness list at least 30 days before trial.<sup>2</sup> However,

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<sup>2</sup> Indeed, the prosecution admits as much in its brief on appeal.

we conclude that the trial court's decision to decline to exclude the witnesses who were not disclosed in a timely manner was not an abuse of discretion. Initially, on this record, the trial court did not clearly err by finding that defendant had notice of the existence of each of the witnesses listed on the prosecution's witness list and amended witness list. The trial court found, and defendant has not produced evidence to suggest otherwise, that each witness was listed in the various police reports and documents that the prosecution disclosed to defendant well in advance of trial. This Court has found that the disclosure of witnesses in reports, thereby providing the defendant with notice of the witnesses, can satisfy the underlying purpose of MCL 767.40a(3) and dispel a finding of prejudice. See *Callon*, 256 Mich App at 327; *People v Williams*, 188 Mich App 54, 59; 469 NW2d 4 (1991). In addition, with regard to the victim's cousin, the witness with whom defendant takes the most umbrage, the record reveals that defendant's trial counsel expressly mentioned the cousin by name during the preliminary examination. Thus, the trial court did not clearly err by finding that defendant had notice of the prosecution's witnesses in advance of trial.

Moreover, defendant cannot establish that the trial court's failure to exclude the witnesses was an abuse of discretion because defendant cannot establish prejudice. See *Callon*, 256 Mich App at 328 (“[T]o establish that the trial court abused its discretion, defendant must demonstrate that the court's ruling resulted in prejudice.”). Defendant never requested a continuance at trial nor alleged that he needed more time to prepare for the witnesses' testimony. Rather, he simply sought to exclude their testimony. Furthermore, on appeal, defendant fails to allege how additional time to prepare for the witnesses' testimony could have made a difference at trial. Indeed, he does not allege a single line of questioning he could have pursued on cross-examination had he had more time to prepare for the witnesses. As such, we find that he fails to establish prejudice. See *Burwick*, 450 Mich at 296 (declining to find prejudice where the defendant was unable to show that additional time to prepare for witnesses would have produced evidence to rebut those witnesses' testimony). See also *Williams*, 188 Mich App at 59 (“It is noteworthy that counsel did not request an adjournment . . . to cure any perceived prejudice resulting from the failure to have the witness list in a timely fashion.”). In addition, the record reveals that defendant's trial counsel engaged each witness in proficient cross-examination. Thus, there is no merit to defendant's claim that he was prejudiced by the late disclosure of the prosecution's witnesses.

Finally, with regard to the issue of prejudice, we note that the evidence against defendant was strong. The prosecution presented circumstantial evidence to corroborate portions of the victim's testimony. For instance, an employee at the motel where the victim alleged defendant engaged her in sexual acts testified that security video showed defendant and the victim arrive at the motel, enter the motel, and leave approximately 20 minutes later. Further, there was evidence that defendant attempted to conceal evidence of his activities in the motel room. For instance, when police officers searched defendant's motel room, they found that the sheets, pillowcases, and mattress pad had been removed from one of the beds in the room. Officers later discovered that defendant had obtained a bowl of bleach from motel employees, had taken the bleach to the laundry room, and that bedding, which appeared to be the bedding that had been removed from defendant's room, was inside the laundry room. Given the strength of the prosecution's case against defendant, as well as defendant's failure to specifically claim how he was hampered in his cross-examination efforts, we find he cannot establish prejudice. See *Burwick*, 450 Mich at 296.

As such, we find that defendant failed to show that the trial court abused its discretion when it denied defendant's motion to exclude the witnesses on the prosecution's untimely witness lists. See *id.* at 297 ("Where, as here, there is no cognizable prejudice to defendant in allowing endorsement, excluding the testimony would convert the salutary purpose of discovery into a weapon against the truth-determining function of the trial process."). See also *Callon*, 256 Mich App at 328 ("Mere negligence of the prosecutor is not the type of egregious case for which the extreme sanction of precluding relevant evidence is reserved. . . . [T]o establish that the trial court abused its discretion, defendant must demonstrate that the court's ruling resulted in prejudice.").

We also reject defendant's claim that the prosecution's late disclosure of certain tangible evidence sought to be admitted as exhibits at trial, including a laboratory report and the victim's statements, entitle him to reversal. MCR 6.201(A)(6) provides that upon request, a party must provide the other with "a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial . . . ." MCR 6.201(F) provides that a party has 21 days to comply with such a request. MCR 6.201(H) requires that whenever a party discovers additional information subject to disclosure, it must, without further request, "promptly notify the other party." If a party fails to comply with the discovery provisions set forth in MCR 6.201, the trial court has discretion to fashion a remedy. MCR 6.201(J). The exclusion of evidence for failure to comply with MCR 6.201 is an "extreme sanction." *People v Rose*, 289 Mich App 499, 526; 808 NW2d 301 (2010). In order to be entitled to relief, a defendant must demonstrate that he was prejudiced. *Id.*

In the case at bar, defendant requested disclosure consistent with MCR 6.201(A)(6) on August 31, 2011. It is undisputed that the prosecution did not disclose the exhibits at issue within 21 days of defendant's request. However, defendant cannot demonstrate that the trial court's decision to deny his motion to exclude the evidence was an abuse of discretion, nor can he demonstrate that he was prejudiced by the untimely disclosure of the exhibit list. Initially, although the prosecution's untimely exhibit list mentioned four exhibits—the victim's clothing, bedding from defendant's motel, video surveillance from the motel room, and a laboratory report conducted on evidence gathered from the victim during a medical examination—only the laboratory report was admitted at trial. Defendant cannot credibly argue that he was prejudiced by evidence that was not admitted at trial. Further, with regard to the laboratory report, defendant should not have been surprised by the existence of the report, given that the trial court stated, at a March 21, 2012 hearing, that the prosecution was awaiting the results of laboratory testing. In addition, according to the prosecution's representations before the trial court, which defendant has not refuted, defendant agreed that the report's author could testify before trial by video conference. Therefore, because defendant had notice of the report's existence, the trial court did not abuse its discretion when it denied defendant's motion to exclude the report. See MCR 6.201(J). Moreover, defendant cannot establish that he was prejudiced by the laboratory report because the report concluded that the sperm cells collected from the victim could not be matched to defendant's DNA profile. Thus, defendant is not entitled to relief. See *Rose*, 289 Mich App at 526.

Defendant's claim with regard to the victim's statements to DHS workers and her handwritten statement, which were not disclosed until approximately one week before trial, is meritless as well. When defendant raised this issue before the trial court, the prosecutor

represented to the trial court that it had disclosed these statements to defendant immediately after discovering them. The trial court found the prosecutor's representation in this regard to be credible. Defendant does not provide any evidence to refute that finding, but simply disagrees with the trial court's determination. On the record before this Court, there is nothing that would allow us to conclude that such a finding was clearly erroneous. Consequently, on this record, the trial court did not clearly err in finding that the prosecution disclosed the statements as it became aware of them. Hence, the prosecution complied with MCR 6.201(H) by honoring its continuing duty to disclose the statements as the prosecution became aware of them. As such, the trial court did not abuse its discretion by declining to exclude the victim's statements. See MCR 6.201(J). Further, even assuming that the prosecution did not disclose the statements in a timely manner, defendant could not establish prejudice. The record reveals that defendant used both of the victim's statements at trial to impeach the victim's trial testimony, and that he even introduced one of the statements at trial as his own exhibit. Accordingly, even in the event that the prosecution's disclosure of the statements was untimely, defendant cannot establish prejudice.<sup>3</sup>

Affirmed.

/s/ Jane M. Beckering  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra

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<sup>3</sup> For the foregoing reasons, we reject defendant's cursory claims that he was denied his Fifth, Sixth, and Fourteenth Amendment rights by the prosecution's late disclosure of the witness lists, exhibit list, and the victim's statements.